

STATE OF CALIFORNIA

SENATE SELECT COMMITTEE TO INVESTIGATE  
PRICE MANIPULATION OF THE WHOLESALE ENERGY MARKET

HEARING RE: REVIEW OF ENRON COMPLIANCE

STATE CAPITOL  
ROOM 2040  
SACRAMENTO, CALIFORNIA

TUESDAY, JULY 2, 2002

10:12 A.M.

Reported by:

Evelyn J. Mizak  
Shorthand Reporter

APPEARANCES

MEMBERS PRESENT

SENATOR JOSEPH DUNN, Chair

SENATOR WILLIAM MORROW, Vice Chair

SENATOR DEBRA BOWEN

SENATOR WES CHESBRO

SENATOR SHEILA KUEHL

SENATOR BYRON SHER

MEMBERS ABSENT

SENATOR MARTHA ESCUTIA

SENATOR MAURICE JOHANNESSEN

STAFF PRESENT

RONDA PASCHAL, Committee Consultant

IRMA MORALES, Committee Assistant

LARRY DRIVON, Special Counsel to Committee

BOB PRATT, Legislative Counsel

SCOTT CHAVEZ, Consultant to Senator Morrow

WADE TEASDALE, Chief of Staff, Senator Morrow

ALSO PRESENT

GARY S. FERGUS, Outside Legal Counsel  
Enron

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0001

01 P-R-O-C-E-E-D-I-N-G-S  
 02 --ooOoo--  
 03 CHAIRMAN DUNN: Seeing that we have a quorum at  
 04 this point in time, Secretary, if we can just call the roll and  
 05 establish our quorum.  
 06 SECRETARY MORALES: Chairman Dunn.  
 07 CHAIRMAN DUNN: Here.  
 08 SECRETARY MORALES: Chairman Dunn here. Senator  
 09 Bowen.  
 10 SENATOR BOWEN: Here.  
 11 SECRETARY MORALES: Senator Bowen here. Senator  
 12 Chesbro. Senator Escutia. Senator Johannessen. Senator Kuehl.  
 13 SENATOR KUEHL: Here.  
 14 SECRETARY MORALES: Senator Kuehl here. Senator  
 15 Morrow.  
 16 SENATOR MORROW: Here.  
 17 SECRETARY MORALES: Senator Morrow here. Senator  
 18 Sher.  
 19 SENATOR SHER: Here.  
 20 SECRETARY MORALES: Senator Sher here.  
 21 CHAIRMAN DUNN: Okay. Having established a  
 22 quorum, let's get started.  
 23 Before we move into the issue that actually  
 24 brought us here on short notice, I want to update everybody re:  
 25 LADWP.  
 26 We had a hearing last week in which we addressed  
 27 the issue of LADWP's potential engagement in Ricochet-type  
 28 transactions. Those who attended or listened to the hearing,

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01 you will know that there was a dispute about transcripts that  
 02 applied to the Ricochet-type transaction in question. We ended  
 03 that hearing, recognizing that, somehow or another, we needed to  
 04 determine which of the transcripts, the one submitted by NEG or  
 05 the one submitted by LADWP, was the accurate one in reference to  
 06 the transaction that was mentioned in the PG&E e-mail that  
 07 started the whole inquiry.  
 08 From the Chair's perspective, at least, in  
 09 reviewing those two transcripts, they seemed irreconcilable.  
 10 They didn't seem to be referring to, albeit a similar  
 11 transaction, the conversations, when you tried to meld the two  
 12 transcripts together, just didn't seem to be possible.  
 13 In a first step effort to resolve the conflict  
 14 between those two transcripts, we went to LADWP yesterday.  
 15 LADWP provided the transcripts on the date in question, which,  
 16 if I recall correctly, was November 11, 2000, and listened to  
 17 the November 11, 2000 tapes.  
 18 What our committee staff member that actually  
 19 listened, and recorded, and is now transcribing the transcripts  
 20 from that tape directly from the LADWP recording has reported to  
 21 us is that the NEG transcripts appear correct.  
 22 We do not know at this time how or why LADWP  
 23 submitted the transcript to us that they, in fact, submitted on  
 24 the morning of our hearing last week.  
 25 Again, from the Chair's perspective at least this  
 26 is extraordinarily troublesome.  
 27 It is the Chair's recommendation that we have no  
 28 choice at this time but to schedule a hearing next week, prior

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01 to the July 11th hearing, to address this issue and the  
 02 potential for contempt against LADWP for the submission of that  
 03 transcript that does not appear to be an accurate one relating  
 04 to the November 11th, 2000 incident involving a potential  
 05 Ricochet transaction. We will work with the committee members  
 06 as far as scheduling, given the status of the Senate, at least

07 right now, on recess to ensure that we get most of the committee  
08 members here.

09 Any other committee members wish to make any  
10 comments? Senator Morrow, any comments on LADWP?

11 SENATOR MORROW: If I could only ask a question,  
12 Chairman Dunn.

13 I've read both transcripts. I haven't heard and  
14 haven't had a chance to be briefed fully on, apparently, the  
15 staff listening to the tapes.

16 Are you saying that the transcript that LADWP  
17 provided had excised portions of the tape, or only given us a  
18 partial, or did they actually change language, or what?

19 CHAIRMAN DUNN: We're trying to determine that at  
20 this time. The staff member that went to LADWP yesterday  
21 recorded it. She is transcribing it this morning. And then  
22 we'll have that copy so we can make that comparison as far as  
23 the question regarding: Was it a transcript from an incident at  
24 an entirely different time, or was it a transcript that excised  
25 particular parts?

26 And we just don't know the answer to that as of  
27 yet, Senator Morrow.

28 SENATOR MORROW: Like you, I find it very  
0004 troubling.

01 CHAIRMAN DUNN: Any other comments from any other  
02 members at this time? Seeing none, let's move right into this  
03 particular issue that brings us here today.

04 Let me just give a little brief background,  
05 although Mr. Drivon will provide the committee the all of the  
06 factual background.

07 This hearing was scheduled as a result of a  
08 production, a series of productions, by Enron in which, upon a  
09 brief review, some questions were raised as to potential  
10 altering, changing, of electronic data within Enron's files.  
11 Because there are some serious questions that have been raised  
12 about this, both legal and factual, we felt it was very  
13 important to bring the committee together to hear from  
14 Mr. Drivon. And Mr. Fergus, representing Enron, is here as  
15 well, and we certainly will invite comments from Mr. Fergus so  
16 that the committee can make decisions as to the most appropriate  
17 action at this point in time.

18 Without anything further, Mr. Drivon, why don't  
19 we turn to you.

20 Mr. Pratt, if you would do your duty, as usual.

21 [Thereupon the witness,  
22 LARRY DRIVON, swore to tell  
23 the truth, the whole truth,  
24 and nothing but the truth.]

25 CHAIRMAN DUNN: Mr. Drivon, if you can, give us  
26 the background to what brings us here today.

27 MR. DRIVON: Thank you, Senator.  
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01 We have been receiving from Enron a considerable  
02 number of CDs containing various information. We probably have  
03 now somewhere close to 50. I haven't counted them. We've been  
04 receiving them over a period of weeks. And the latest was a  
05 receipt, which I believe we got on the 25th. I might be a day  
06 or two off, but the sequence will be correct, I think.

07 CHAIRMAN DUNN: Which was last Tuesday, a week  
08 ago today.

09 MR. DRIVON: That's correct.

10 Some of this I put together later, but I'll run  
11 it chronologically and then tell you how I learned what I  
12 learned and when.

13 As I now understand, when the package arrived



14 from Enron on the 25th, it contained a number of diskettes, and  
15 there was a call made by an Enron representative to the Senate  
16 mail facility, attempting to intercept the Fed Ex package and  
17 have it returned to them. That request was not complied with,  
18 either because it was impossible, or they didn't want to, or  
19 whatever. But in any case, they came to our office.

20 When they came to our office --

21 CHAIRMAN DUNN: "They" referring to the  
22 diskettes?

23 MR. DRIVON: The diskettes came to our office.  
24 We handled them as we always do, and a review was begun on  
25 them.

26 And I got a telephone call the next day, which I  
27 believe would have been the 26th, from Mr. Fergus.

28 CHAIRMAN DUNN: Wednesday?

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01 MR. DRIVON: On Wednesday, as we were preparing  
02 for hearing.

03 CHAIRMAN DUNN: On Thursday.

04 MR. DRIVON: And that call was to the effect that  
05 there had been an inadvertent disclosure by way of those  
06 diskettes of attorney-client privileged information, and a  
07 request was made that we get -- that we send those diskettes  
08 back to them.

09 I told him in that phone conversation that I  
10 would not send the diskettes back to them until I had an  
11 opportunity to determine what course of action we were going to  
12 take.

13 At that point, I went to the committee staff  
14 people, who do the actual physical review of these documents,  
15 and one of those staff persons indicated that the diskettes in  
16 question had been looked at, and that there were some disturbing  
17 documents in there.

18 I immediately sequestered all of the diskettes  
19 that contained the names that were supplied to us by Enron on a  
20 list of the attorneys' e-mails they wanted back.

21 CHAIRMAN DUNN: If I may interrupt.

22 For the committee's sake, can you share in a  
23 little detail exactly what we're referring to? I believe that  
24 there's a division between pre-bankruptcy and post-bankruptcy  
25 issues with respect to the attorney-client privilege.

26 MR. DRIVON: As we now understand it, I'm still  
27 looking into exactly what the original agreement was with waiver  
28 of the attorney-client privilege, Enron's position is now, and

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01 they may be absolutely accurate, that they waived the  
02 attorney-client privilege for pre-bankruptcy filing documents,  
03 and maintained the privilege with respect to post-bankruptcy  
04 filing issues.

05 CHAIRMAN DUNN: That would be December of '01?

06 MR. DRIVON: '01, so that about the last six  
07 months' worth of attorney-client communications would be  
08 privileged, and they may be correct about that. I simply  
09 haven't had time to go back and look at the documents to see  
10 what we agreed to originally.

11 In any case, I sequestered those cassettes, put  
12 them in a safe under my control. And right now, they're in my  
13 briefcase behind you.

14 And I then came to you and discussed this matter,  
15 interviewed the staff member involved. Went to those diskettes  
16 myself, and in a private place, looked at them to determine --  
17 found the two documents that were involved, in order to  
18 determine for myself what they had to say, because I didn't want  
19 to just get up here, not having seen them myself.

20 I consulted two different computer experts, one a

21 forensic expert, and the other an expert in Microsoft  
 22 programming, with respect to what I had seen. I did that on a  
 23 hypothetical basis.  
 24 This morning, I made one copy of the two e-mails.  
 25 Showed them to Mr. Fergus. He agreed that they were probably  
 26 not privileged, the content wouldn't privilege them, and he  
 27 allowed me to present copies of those to the committee.  
 28 If we look at the top e-mail, what it is, is  
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 01 really not an e-mail, although it's done Microsoft Outlook. On  
 02 April the 29th, at 5:50, there was a synchronization procedure  
 03 done on Mr. Sanders' computer. Mr. Sanders is one of the top  
 04 Enron counsel in Houston, and the man that we've been working  
 05 with most closely in-house at Enron.  
 06 This synchronization procedure, for those who  
 07 don't understand computers, is a procedure whereby a user can  
 08 synchronize the data on one computer with the data on a  
 09 different device, usually another computer. It can also be a  
 10 Palm Pilot, or something like that.  
 11 There are a number of very innocent explanations  
 12 for synchronization. I just have indicated at least one.  
 13 However, there are techniques that can be used  
 14 through synchronization to deposit files in an offline machine  
 15 of some kind, and then do whatever you want to do with those  
 16 files, and, under certain circumstances, they can avoid further  
 17 detection within the main system.  
 18 If you look down at the fifth and sixth items on  
 19 that log, you'll see "16:50:13 4 item(s) added to offline  
 20 folder."  
 21 That just means that whoever was doing that, say  
 22 they were loading a laptop, put those four items on the laptop.  
 23 The next item is, "5 item(s) deleted in offline  
 24 folder."  
 25 What that means is, there was an offline folder.  
 26 And those items, through the synchronization process, were  
 27 deleted. Now, there are an unlimited number of possibilities  
 28 that would be described innocent documents they may have  
 0009  
 01 deleted. Not a calendar entry, because that's a different file,  
 02 but they may have deleted, you know, a note to the lunch place  
 03 for their lunch order. It could be anything that was deleted.  
 04 There's no way of knowing.  
 05 The conversation that I had with Mr. Fergus, who  
 06 is here -- Mr. Fergus is the outside counsel for Enron that  
 07 we've been working with, and our relationship with Mr. Fergus  
 08 has been excellent. He indicates to me this morning that  
 09 according to the top IT people at Enron, there is a log made and  
 10 a recording made of all deleted items, whether they're deleted  
 11 offline or online.  
 12 I trust that that's what he was told by his IT  
 13 person, and that may be accurate. It's difficult for me to  
 14 understand how they could make a tape of an offline deletion,  
 15 but that remains to be seen.  
 16 Mr. Fergus agrees that there is no way to  
 17 characterize, or at least I believe he agrees that there's no  
 18 way to characterize what the content of those deleted items may  
 19 be, other than if there is a tape made of them pursuant to the  
 20 orders to retain all of this material, then we, I guess, could  
 21 find it.  
 22 What is troublesome to me, and I know is  
 23 troublesome to you, Mr. Chairman, because we have discussed  
 24 this, and you didn't see the content of this until this morning,  
 25 when I had clearance to show it to you. What's troubling to me  
 26 is that this -- these items occurred within the first 20  
 27 documents on this disk. I have no idea, because I stopped any

28 review by anyone when the claim of privilege was made, I have no  
0010 idea what else may be on those disks.

02 CHAIRMAN DUNN: The disks you're referring to are  
03 ones that Enron has requested be returned?

04 MR. DRIVON: That's correct.

05 Now, there is a little bit of, you know,  
06 different considerations here. On the one hand, clearly the  
07 doctrine of attorney-client privilege is very central to the  
08 administration of justice in our system, because without it, the  
09 justice system won't work.

10 On the other hand, the potential that documents  
11 have been deleted, or privilege otherwise claimed when none  
12 exists, is a very, very serious situation for this committee.

13 CHAIRMAN DUNN: Senator Bowen.

14 SENATOR BOWEN: This situation raises for me  
15 another set of issues which has to do with the law in the State  
16 of California regarding inadvertently produced material.

17 A legal matter that I followed for some years on  
18 a casual basis, there were periodically cases reported in the  
19 Los Angeles Daily Journal, which is the legal newspaper, and my  
20 recollection, at least of the early cases that I was reading, is  
21 that even if material is produced inadvertently, say by the  
22 production of a diskette that has files that were attempted to  
23 be erased but were not in fact erased, because you can use  
24 something like Norton Utilities to restore the first character  
25 of the file, that that material is deemed produced.

26 Do you know -- I don't know the state of the law  
27 with great specificity.

28 MR. DRIVON: There are conflicting -- there are  
0011 conflicting rules on that, and I'll try to be as accurate as I

02 can in this. I know that Mr. Fergus is here and will add his  
03 lawyerly take on it, too.

04 There is at least an American Bar Association  
05 ethical suggestion. I call it a suggestion because I don't know  
06 what else you call those things. I'll be corrected shortly by  
07 the Professor here.

08 But in any case, it's what's commonly referred to  
09 in litigation as the "Oops Clause," which means somebody sends  
10 you something they shouldn't send you, and you discover it,  
11 you're supposed to, according to that, immediately stop  
12 reviewing it and return it intact to the person who sent it to  
13 you by mistake.

14 There are a variety of cases around the country,  
15 I believe, that treat inadvertent disclosure in different ways,  
16 some of them saying it's disclosed, some of them saying it  
17 constitutes a waiver, others saying it does not.

18 I treated in the most conservative way that I  
19 could, which was to sequester this information. If this  
20 happened, and I spoke with Mr. Fergus and Mr. Sanders yesterday  
21 on this, although I didn't have them with me yesterday, these  
22 exact copies, so I couldn't talk to them specifically about  
23 them, but what I said was, "If this occurred in a litigation  
24 setting, and I had inadvertently looked at this material and  
25 discovered what I thought might be improper activity evidenced  
26 therein, what I would do is, I would go to the Court and submit  
27 the materials to the Court and ask that there be an in camera  
28 review of the material by the judge.

0012 The procedure that we have here, as set forth in  
01 statute under the Constitution, gives the Chair of the committee  
02 the same role as a judge. It's a little bit difficult to  
03 separate in the minds of some that the Chair of the committee  
04 would not be -- the committee would not be reviewing the

06 documents. The Chair would be reviewing the documents in  
07 camera. But that is the procedure that's set out.  
08 Now, that of course, creates a lot of other  
09 issues and problems. Enron suggested that the Chair should look  
10 only at the documents that we have previously determined and  
11 decide what he wanted to do with those, and then to go forward.  
12 And to look at rest of the documents that they wanted back would  
13 be to suppose that others at Enron were dishonest or acting  
14 improperly.

15 My retort to him was that to do otherwise would  
16 be to assume that others at Enron were not nefarious in their  
17 activities, and that was an irreconcilable difference of opinion  
18 there.

19 My recommendation to the committee -- oh, there  
20 is one other point that I need to make before I make my  
21 recommendation.

22 These documents that have been produced to us now  
23 have been produced in what's called a TIF format. For those of  
24 you who were here when the forensic expert testified --

25 CHAIRMAN DUNN: And even for those of us who were  
26 here for it, if we could explain it again.

27 MR. DRIVON: I'm about to do that, since I saw  
28 senator Morrow's and your brows purse, and a vacant look come.

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01 You heard from Mr. Sorokin a very detailed  
02 explanation of what can be done with meta data and with the raw  
03 electronic data that is maintained by a computer.

04 When you produce a document as a TIF file, in  
05 effect what you've done is, you've printed that document. There  
06 are several ways to do it, but in effect you've printed that  
07 document, turned it into a printed copy like I'm holding in my  
08 hand. You then image that document, take a picture of that  
09 document, and put the picture on the computer. At that point,  
10 any meta data associated with it is gone. So, there is no  
11 ability to look at that in an electronic way, or to expose the  
12 documents to forensic analysis.

13 All of the documents that have been produced  
14 recently have been produced in TIF format, at least on the  
15 diskettes.

16 I mentioned that yesterday to Mr. Fergus and  
17 Mr. Sanders, and have been told that that's a problem that can  
18 be solved. They can't -- or yesterday couldn't explain to me  
19 why that process had been followed, although maybe somebody else  
20 that's conducting an investigation had asked for it to be done  
21 that way.

22 That is a process that is a lot more time  
23 consuming for the producing party, and much more expensive than  
24 just producing the electronic copy. But it also stops us from  
25 doing any word searches, like, you know, running whatever word  
26 we wanted to run.

27 So, with those two things in mind, and we'll  
28 follow up and get the electronic copies of these rather than TIF

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01 files, but it is my recommendation to the committee, and for  
02 your consideration and discussion, that we not return these  
03 diskettes to Enron until we have gone through them for the  
04 purpose of determining whether there is other information there  
05 that has been deleted, or other evidence of that type.

06 CHAIRMAN DUNN: I'm going to turn to Senator  
07 Bowen in one second.

08 Do you have a recommendation on how that review  
09 should be done?

10 MR. DRIVON: Well, I believe that under the law,  
11 I would suggest that we apply the law that would require that  
12 this be done in camera.

Now, realizing, Senator Dunn, that you have one or two other things on your calendar that might interfere with your personally looking at several thousand pages of information in TIF format, the statutes do not tell us how the Chair is to accomplish that.

I would believe, and would advise the committee, that the Chair could appoint appropriately appropriate individuals who have been -- have had confidentiality imposed upon them at that level, and that the product of their work be for your eyes only, and no other distribution be made so that you didn't have to look at all of these documents yourself personally.

And I would agree that that -- that the supervision, direct supervision, of that process would be my responsibility, and I would undertake that.

CHAIRMAN DUNN: Senator Bowen.

SENATOR BOWEN: Mr. Drivon, I may be asking the wrong person, and if I am, you should tell me, because the question I have is really part discovery-related in part, and part computer-related.

Under normal circumstances, if a file is maintained by the, I guess the term is owner, in a let's say Outlook, Microsoft Outlook or Lotus Notes format.

Would you expect that the document production would also be made in Lotus Notes or Microsoft Outlook format?

MR. DRIVON: I would. Although in fairness to Enron, they have been the subject of a number of different investigations. Some of those investigating bodies may not feel themselves sophisticated enough to analyze the data or look at the data in an electronic format, and may just have demanded that it be done in paper.

I can -- I mean, some people might want to do that.

On the other hand, and that could be the explanation why they had the paper. That doesn't to me explain why they didn't produce the electronic information.

As you know, Senator Bowen, if you have, for instance, a hard drive with 100 gigabytes of e-mails on it, you can image that hard drive in 20 minutes, less if you have high speed equipment. And it can be produced -- I mean, 100 gigabyte hard drive is \$150 or less.

SENATOR BOWEN: But you then run the risk that you inadvertently produce material that has been deleted for perfectly legitimate reasons, but in which a file could still be

restored.

MR. DRIVON: Well, except that if you have waived all privilege of every type up to a certain date, you can date-limit the copy, so that you only retrieve, and then you can go from there and go through the remaining documents to determine which of them are privileged and which are not. So, it could be a very quick process.

SENATOR BOWEN: Even without imaging the whole hard drive, you can use a function that essentially copies all of the files in the same format.

MR. DRIVON: Sure.

SENATOR BOWEN: I'm curious about this format shift.

MR. DRIVON: Well, it's a curious question. And again, it may have an innocent explanation, and it may not.

SENATOR BOWEN: TIF files are hard to read.

MR. DRIVON: All I know is that, you know, Senator Dunn asked me yesterday to try to explain to him what it meant. And I undertook that task.

20                   What it really means is, it's similar to making a  
21 photocopy of each individual page. If you have a 50-page  
22 document, you make 50 photocopies. Then you put each one of  
23 those photocopies in a ringbinder. And then you have a whole  
24 stack of ringbinders with one page in each one.  
25                   In order to read the document, you have to take  
26 each ringbinder off the shelf separately and open it up to read  
27 the document. Close it up, because you can only have one  
28 ringbinder open at a time, and go to the next one. Which is a  
0017 very, very cumbersome process.  
01                   CHAIRMAN DUNN: And I'll admit that when he used  
02 that analogy, I actually understood.  
03                   MR. DRIVON: Which is a credit and proves that  
04 I'm worth what you're paying me for this job.  
05                   I mean, one explanation is that such a thing  
06 could be done simply to impede the ability of others to look at  
07 it, or to search it. That's one possibility.  
08                   I have to admit that, given, you know, the  
09 background that we've had with Enron, and not talking about  
10 Mr. Fergus or even Mr. Sanders in particular, because they've  
11 been better with us than some, I tend to get a little bit  
12 suspicious.  
13                   SENATOR BOWEN: That's, I think, the basis for  
14 some of my questions. You discussed, the presumption is that  
15 data has been produced properly and has not been manipulated, or  
16 the assumption is that data may not have been properly produced.  
17                   At this point, given the history with Enron of  
18 the company going to the brink of being cited for contempt, and  
19 then, you know, producing boxes that include dirty coffee cups,  
20 and God only knows what, I don't have the assumption, again not  
21 speaking about Mr. Fergus or anyone who might be working on this  
22 now, but my working assumption is that the company is not  
23 respectful of this process, and will use any and all, or could  
24 use any and all mechanisms that are available to it to avoid  
25 having to turn over information sought by the committee for over  
26 a year.  
27                   MR. DRIVON: May I have my briefcase, Senator.  
0018  
01                   SENATOR BOWEN: So, we're not operating here with  
02 someone who just recently, after a history of fully producing  
03 all material requested by the committee, suddenly,  
04 inadvertently, produced something. We have a history.  
05                   MR. DRIVON: These are the disks themselves.  
06                   But what I wanted to pull out of my briefcase,  
07 this is a binder that contains within it an expanded version of  
08 what you saw at the last hearing, with the various --  
09                   CHAIRMAN DUNN: Let me interrupt.  
10                   What he's referring to is the expanded  
11 presentation of the IT forensic expert from last week.  
12                   MR. DRIVON: This binder has within it actual  
13 copies of documents that support the slides and so forth.  
14                   And, you know, I talked to Mr. Fergus and I  
15 talked to Mr. Sanders, and we have a good relationship. And I  
16 believe them to be honorable people, at least we have that sort  
17 of a relationship.  
18                   However, I agree with you, Senator Bowen. I've  
19 just come off a situation where we did a forensic analysis on  
20 six -- excuse me, nine, oops, three-quarters of one CD, that  
21 cost a lot of money, took a lot of time, and showed, you know,  
22 significant problems with the data that we were supplied.  
23                   Now -- and that's -- under ordinary  
24 circumstances, I wouldn't have done this. Under ordinary  
25 circumstances, I would have packed this stuff up and sent it  
26 back to the fellow that sent it to me.

27 But I'm forced to be a little more suspicious  
28 than that.

0019

01 SENATOR BOWEN: I'm forced to be a lot more  
02 suspicious than that.

03 I mean, zeroing out data, and one of the CDs that  
04 we got had files, or a large file, in which data wasn't deleted;  
05 it was overwritten with a series of zeroes.

06 From my early days, when I thought I was really  
07 cool because I had a computer with two floppy drives, one of the  
08 things that I knew was that the easiest way to keep anyone from  
09 looking at what data might have been there was to overwrite it  
10 with zeroes. That eliminates the possibility that someone might  
11 find data fragments remaining, words, phrases, whatever, that  
12 are still there in digital format that could be read with a  
13 search. A search of zeroes produces zero.

14 So, that is not something that one would do by  
15 accident. There's no program that would, that I'm aware of,  
16 that would accidentally write a series of zeroes over a very  
17 large file.

18 So, I have to make the assumption that there is a  
19 desire remaining with regard to this particular company to avoid  
20 producing material that was requested first well over a year  
21 ago.

22 MR. DRIVON: This document here is, including its  
23 headers, and in a TIF format, is 13 kilobytes.

24 The zeroed data was 20.5 megabytes, which means,  
25 for folks who don't understand what we're talking about, several  
26 hundred of these would be in what was zeroed out.

27 CHAIRMAN DUNN: Let me make one editorial, then  
28 I'm going to turn to Senator Morrow, who also has some

0020

01 questions.

02 You mentioned that under ordinary circumstances.  
03 We long ago passed out of ordinary circumstance with respect to  
04 this investigation.

05 Senator Morrow.

06 SENATOR MORROW: Thank you, Senator Dunn.

07 Mr. Drivon, I just want to clarify a few things.  
08 You indicated that Enron had given us 50 CDs. I want to  
09 clarify, how many of those CDs, or all of them, are they  
10 claiming would fall under their claim of privilege?

11 MR. DRIVON: I can't give you a precise answer,  
12 so let me give you this answer.

13 They gave us a list of names of attorneys that  
14 they wanted us to return CDs that contained e-mails from those  
15 lawyers.

16 CHAIRMAN DUNN: Past December of last year.

17 MR. DRIVON: Well, the problem was, is that the  
18 CDs are labeled with one name. For instance, this particular CD  
19 has the name of Deborah Perlingiere, P-e-r-l-i-n-g-i-e-r-e.  
20 E-mail it says.

21 I have no way of knowing whether everything  
22 that's on here is hers, isn't, whatever. And I don't know  
23 whether some of her information appears on CDs that may not have  
24 a label on them.

25 So what we did was, we went through and picked  
26 out CDs that were labeled with the names of the people they were  
27 asking us to send back, and we have nine CDs here that fit that  
28 category.

0021

01 CHAIRMAN DUNN: There was approximately 15 names  
02 that were provided to us.

03 SENATOR SHER: In this letter.

04 CHAIRMAN DUNN: Yes, correct, Senator Sher.

05 SENATOR MORROW: Were these provided on the 25th  
06 of June?  
07 MR. DRIVON: No, sir. Those names, I believe,  
08 were provided on the 1st of July.  
09 CHAIRMAN DUNN: Senator Morrow, you're referring  
10 to the actual CDs provided to the committee, or just the list of  
11 names?  
12 SENATOR MORROW: No, no, the CDs.  
13 CHAIRMAN DUNN: That's what I thought.  
14 MR. DRIVON: The 25th on the CDs; the 26th, I  
15 believe, on the names.  
16 CHAIRMAN DUNN: Senator Sher.  
17 SENATOR SHER: Is there any indication, or any  
18 way of knowing about the date of the e-mails that are contained  
19 on these CDs?  
20 MR. DRIVON: Not without looking at them. I  
21 mean, in other words, I can't -- the answer is not without  
22 looking at them.  
23 If you look at the copy that you have, Senator  
24 Sher, you'll see that it carries a date on it. And I can tell  
25 that this particular e-mail was done on April the 29th, or this  
26 particular procedure.  
27 SENATOR SHER: April 29th of --  
28 CHAIRMAN DUNN: '02.  
0022  
01 MR. DRIVON: '02, at 5:50 in the afternoon.  
02 CHAIRMAN DUNN: If I can add one thing, Senator  
03 Sher.  
04 SENATOR BOWEN: It's 4:50.  
05 MR. DRIVON: No, if you look at the "Sent" line.  
06 I think it's a Daylight Savings Time issue. One device was on  
07 one time; the other was on a different time.  
08 CHAIRMAN DUNN: And the only thing I wanted to  
09 add before I turn back to Senator Morrow and Senator Sher is,  
10 Enron's offer was, if we returned all the CDs involving those  
11 individuals, they would provide us corrected copies from their  
12 perspective, meaning only pre-bankruptcy filing information.  
13 MR. DRIVON: Yes. And Mr. Sanders and Mr. Fergus  
14 have suggested to me that the appropriate way to resolve this  
15 issue would be for us to only review in camera either the  
16 precise documents that we have questions about -- that would be  
17 these two -- and send everything else back. Or, perhaps, if  
18 there was sufficient suspicion, all of the data having to do  
19 with this particular individual, which would be Mr. Sanders, and  
20 send everybody else back.  
21 I've told them I didn't believe that I could  
22 recommend that procedure to the committee because that would  
23 cause me to assume that everybody else was doing things right,  
24 or that Mr. Sanders had done everything else right. So, I can't  
25 recommend that to the committee.  
26 SENATOR SHER: Is December 2nd, 2001, that's the  
27 date of bankruptcy?  
28 CHAIRMAN DUNN: Date of bankruptcy filing, right.  
0023  
01 SENATOR SHER: And according to the letter from  
02 Fergus, there was an agreement to waive the attorney-client  
03 privilege prior to that date.  
04 So, this is a question of the agreement, or is it  
05 a question of the bankruptcy law that's at issue here?  
06 CHAIRMAN DUNN: Let me be specific.  
07 I believe what we're referring to here is, the  
08 board of Enron made a decision at the board level to waive the  
09 attorney-client privilege as to investigations that were  
10 ongoing. Not necessarily private litigation or other matters  
11 that may be pending, but as to state and federal investigations.



12 But as we've been advised by legal counsel for  
13 Enron, the Enron board's dividing line for the waiver of the  
14 attorney-client privilege was only applicable to pre-bankruptcy  
15 filing material.

16 SENATOR SHER: Was that made clear to us when  
17 they waived the attorney-client privilege?

18 CHAIRMAN DUNN: I'll only speak for myself, and  
19 welcome, Mr. Drivon, your own comments.

20 Until this issue surfaced, at least I never  
21 received any information that it was specifically -- there was a  
22 dividing line between pre and post.

23 SENATOR SHER: The claim in the letter, dated  
24 June 22nd, is that Enron has not waived the attorney-client  
25 privilege beyond December 2nd.

26 There's no reference to bankruptcy, and the law  
27 of bankruptcy, making it different. It's a question whether  
28 they waived it or not.

0024

01 CHAIRMAN DUNN: Yes, I agree with that, Senator  
02 Sher. It has nothing to do with bankruptcy rules. It was  
03 simply a decision by the Enron board that they voted on with  
04 respect to the waiver of attorney-client privilege re:  
05 investigations.

06 SENATOR SHER: So, it's your position,  
07 Mr. Chairman, that if this were a matter of the agreement with  
08 the committee, there was no such agreement; is that right?

09 CHAIRMAN DUNN: I want to be honest from my  
10 perspective.

11 When we've been dealing with Enron re: the  
12 attorney-client waiver, it's always been said in generic terms.  
13 Correct me if I'm wrong, Mr. Drivon.

14 As to this limited issue, about whether in fact  
15 these documents still fall within a claim of attorney-client  
16 privilege by Enron, I think the deciding factor is what the  
17 Enron board voted.

18 Mr. Drivon, do you have any different opinion?

19 MR. DRIVON: Well, first of all, as I said  
20 earlier, I have not had an opportunity to go back and look at  
21 whatever documents might shed light on this issue.

22 It is my memory, however -- let me say it  
23 differently. It is not my memory that there was a limitation on  
24 it that I understood. There very well may be, and it may be  
25 there, but I don't remember it as I sit here.

26 CHAIRMAN DUNN: I agree with that.

27 MR. DRIVON: Now, my understanding with respect  
28 to waiver of the attorney-client privilege is, it's a very

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01 tricky thing to limit. And if you're going to say, I'm going to  
02 give a limited waiver of the attorney-client privilege, it has  
03 to be pretty well spelled out. So, I don't -- because, you  
04 know, you can get yourself in a problem waiving the  
05 attorney-client privilege if you're not really careful.

06 SENATOR SHER: Mr. Chairman, if I understand the  
07 issue before us, there are two aspects of it.

08 If we take the position that there are no such  
09 limits, and this date reflected in some action of the board is  
10 not applicable to what actually was done, then it's irrelevant  
11 what's on those tapes as far as dates go.

12 On the other hand, the second aspect of it, if  
13 they're correct, and there was a limit, and the line is drawn at  
14 December 2nd, then issue is, are there communications on these  
15 CDs that predate the December 2nd date. And that we would want  
16 to determine for ourselves before we send it back and rely on  
17 Enron to go through them again and send us new ones for those  
18 that predated December 2nd.

19 CHAIRMAN DUNN: I think it's a little different  
 20 as to the second option Senator Sher.  
 21 What Mr. Drivon is recommending is, given that  
 22 there is a claim for attorney-client privilege, whether we agree  
 23 or disagree with it, for post-December 2nd material, that the  
 24 rules that govern this committee's operation is that when there  
 25 is such a claim, the Chair is the entity that rules on that  
 26 claim.  
 27 What Mr. Drivon has recommended is that the  
 28 Chair, and with a designee or two to assist in that process, do  
 0026 an in camera review to ultimately rule on whether, in fact,  
 01 those documents should be remain in the possession of the  
 02 committee.  
 03 SENATOR SHER: I mean, if it were conclusive that  
 04 the December 2nd cutoff date was effective on the waiver of the  
 05 attorney-client privilege, all you would be looking for then is  
 06 pre-December 2nd.  
 07 CHAIRMAN DUNN: With one exception, and that is  
 08 the content of these two e-mails that suggest -- nobody's drawn  
 09 any definitive conclusions -- but at least one option is, there  
 10 has been deletions of material that should have been produced to  
 11 the committee.  
 12 MR. DRIVON: Pursuant to the subpoena.  
 13 I mean, if in fact material has been deleted or  
 14 otherwise obscured, it's a really serious situation. And I  
 15 believe that -- I don't believe that the attorney-client  
 16 privilege, even if it were intact, would protect such activity.  
 17 So, you know, the Chair could very well find that  
 18 there were attorney-client communications that are not  
 19 privileged and do postdate December 2nd.  
 20 So, it's not just a matter of going through and  
 21 saying, everything that's in here after December 2nd is  
 22 privileged, and recognizing that -- if we recognize that the  
 23 privilege extends. That's because, you know, most of what an  
 24 attorney does isn't privileged anyhow. It's only under limited  
 25 circumstances. And the privilege can be defeated by conduct.  
 26 So, you know, and I welcome any kind of comment  
 27 from a legal standpoint that Mr. Fergus wants to make.  
 0027 CHAIRMAN DUNN: We're going to bring him up here  
 01 in just a minute.  
 02 MR. DRIVON: I'm trying to be as fair with this  
 03 as I can.  
 04 SENATOR MORROW: I still have questions. Let me  
 05 get back to what I was trying to clarify, at least in my mind.  
 06 We have these disks. And Enron has given you a  
 07 list of names, which they're asserting communications to and  
 08 from those individuals would be privileged.  
 09 That list of names, presumably, are they Enron  
 10 attorneys?  
 11 MR. DRIVON: That's my understanding.  
 12 SENATOR MORROW: How about Mr. Sanders. Is that  
 13 name on the list?  
 14 MR. DRIVON: Mr. Sanders' name is on the list,  
 15 and Mr. Sanders -- I don't know what his exact title is, but  
 16 he's way up there in the General Counsel's office.  
 17 SENATOR MORROW: Now, this particular e-mail that  
 18 we have in front of us, Mr. Drivon. That's contained in one of  
 19 these disks --  
 20 MR. DRIVON: Yes.  
 21 SENATOR MORROW: -- that they're trying to get  
 22 back?  
 23 MR. DRIVON: Yes.  
 24 SENATOR MORROW: I mean, it strikes me,  
 25

26 apparently there's no -- or somehow we've satisfied any concerns  
27 with Enron. This document that we're looking at is not  
28 privileged. We've we clarified that.

0028

01 MR. DRIVON: Yes.

02 SENATOR MORROW: It strikes me, then, what we're  
03 wrestling with is that they have co-mingled, if you will,  
04 messages and communications that they're going to claim as being  
05 privileged with other communications, such as this, that  
06 apparently there would be no claim, or at least entitlement to a  
07 privilege.

08 Do I have it right?

09 MR. DRIVON: Yes.

10 SENATOR MORROW: They're saying, "Give us all the  
11 tapes back. We'll sift through it and give you what is not  
12 privileged."

13 And what we're wrestling with, or at least what  
14 I'm wrestling with then is, it's a trust factor.

15 I mean, I've got to tell you, after last week's  
16 hearing I was absolutely outraged with Mr. Sorokin, and  
17 apparently, we literally caught Enron in electronically and  
18 through the computer destroying, deleting evidence. I'm not  
19 going to sugarcoat it. I believe that to be evidence of a crime  
20 in itself.

21 Which brings me to a bigger question. In camera  
22 or otherwise, if we're reviewing these documents or e-mails, and  
23 it's evident that those e-mails themselves are evidence of a  
24 crime, even if it is privileged, what's our responsibility as a  
25 committee to do with that?

26 Look, I'm no expert in the criminal laws of the  
27 State of California, but my gut tells me there's something along  
28 the lines of obstruction of justice in official proceedings, and

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01 electronic shredding, which we read in the newspapers Enron has  
02 a history of, or even to Arthur Andersen and the like. We've  
03 seen now that, I think, first-hand; this committee has  
04 personally experienced that.

05 It appears to me, they've handed over a rather  
06 large haystack in which they have, beforehand, taken out all the  
07 needles.

08 So, I'm very concerned about just giving these  
09 things back. I think I'm very supportive of your recommended  
10 procedure.

11 MR. DRIVON: If there is evidence of criminal  
12 activity, I don't believe that the attorney-client privilege  
13 would protect the material.

14 And that these documents are on this particular  
15 disk right here, this one.

16 CHAIRMAN DUNN: I just want to make one other  
17 comment, and Mr. Fergus, we're going to call you up, and that is  
18 that, Senator Morrow, actually for the entire committee's  
19 review, one of the names that was on the list in Mr. Fergus'  
20 letter was Mr. Shapiro, who was a Vice President of Government  
21 Affairs. His CD disk was -- we were requested to return that.

22 Mr. Shapiro's electronic data was the one that  
23 was zeroed out, as Senator Bowen referred to before. It's one  
24 of the reasons why it gives us a little more concern here.

25 SENATOR BOWEN: I think we should use another  
26 term. It's written over, not zeroed out.

27 CHAIRMAN DUNN: Correct, correct.

0030

01 just that it's all zeroes.

02 CHAIRMAN DUNN: Exactly.

03 Mr. Fergus, why don't we bring you forward.

04 You've been patiently waiting there, which we greatly  
 05 appreciated.  
 06 And I also want to extend a thank you for getting  
 07 here on the last minute, since this was so quickly arranged.  
 08 We're going to swear you in, as we do with  
 09 everybody, Mr. Fergus.  
 10 [Thereupon the witness,  
 11 GARY FERGUS, swore to tell  
 12 the truth, the whole truth,  
 13 and nothing but the truth.]  
 14 CHAIRMAN DUNN: Have a seat. I'll open it up to you,  
 15 and make whatever comments you want, and we'll open it up for  
 16 questions.  
 17 I'm going to turn over the Chair to Senator  
 18 Morrow for about 30 seconds.  
 19 SENATOR MORROW: Mr. Fergus. Go ahead.  
 20 MR. FERGUS: Mr. Chairman, members of the  
 21 committee, thank you for allowing me to speak.  
 22 Because I have been sworn as a witness, but I am  
 23 here as Enron's lawyer, I must tell you that the information  
 24 that I'm providing you is upon information and belief, except  
 25 where I so state that it is personal knowledge.  
 26 Otherwise, I will have to, in front of every  
 27 statement, say that I am informed and believe.  
 28 If that is acceptable to the committee, I'm happy  
 0031 to proceed in either fashion.  
 02 SENATOR MORROW: Well, that's acceptable thus  
 03 far. Obviously members of the committee may have questions that  
 04 may wish to delve deeper into whether it's more than on  
 05 information and belief.  
 06 MR. FERGUS: Perfectly understandable, your  
 07 Honor.  
 08 SENATOR MORROW: With that ground rule, that's  
 09 fine; that's acceptable.  
 10 MR. FERGUS: One of the things that Mr. Drivon  
 11 did not mention, and I must also comment that the working  
 12 relationship between the Chair, and Mr. Drivon, and myself,  
 13 Enron, has been, I think, very positive. I was very  
 14 appreciative to be able to learn of this hearing on short notice  
 15 and to be able to understand what it was about.  
 16 Nevertheless, there was a letter issued yesterday  
 17 that I think is relevant. I wrote it. It states Enron's  
 18 position, and it is unequivocal.  
 19 It is Enron's position that it will not claim  
 20 attorney-client confidentiality for e-mails that evidence wrong  
 21 doing.  
 22 This was written at a time when it wasn't  
 23 possible because of logistics for Mr. Drivon to give us a copy  
 24 of what it is he was looking at.  
 25 Nevertheless, Enron does assert, and I have been  
 26 instructed by my client to assert, the attorney-client privilege  
 27 for communications that occurred after December 2nd, 2001.  
 28 The first point I would like to make is, in  
 0032 connection with the specific documents that you have in front of  
 01 you, the two synchronization logs. I had an opportunity to look  
 02 at those at 9:30 or so this morning. I was able to call Houston  
 03 and speak to the head of the IT group at Enron, Mr. Mark  
 04 Tibideaux.  
 05 I must also apologize that although the committee  
 06 requested the presence of an Enron corporate representative,  
 07 given the late notice and the time zone shift, it just was not  
 08 possible to get someone here.  
 09 But according to Mr. Tibideaux, when I described  
 10

11 these documents, he explained to me that since December of 2001,  
12 under orders from the Bankruptcy Court, and under understandings  
13 with various other investigative agencies, that the Enron  
14 electronic system is set up such that documents that individuals  
15 delete are logged, and recorded, and stored on a backup tape.  
16 And I specifically asked him the question about offline folders  
17 and the Microsoft context. And my understanding is that there  
18 is a backup log of that.

19 Now, one of the things that -- I realize that  
20 this is all rather late-breaking, but one of the advantages of  
21 having, I think now, a cooperative relationship is, when issues  
22 like this arise, we can find out about it, and provide all the  
23 information so the committee's fully informed. That's helpful.

24 But this information, as I said, was  
25 late-breaking.

26 CHAIRMAN DUNN: Mr. Fergus, let me interrupt.  
27 Senator Kuehl has a question.

28 SENATOR KUEHL: Just a clarification.

0033

01 You said, as you did in your letter, that there's  
02 no assertion of attorney-client privilege on communications that  
03 evidence wrong doing.

04 But there is an assertion of attorney-client  
05 privilege for documents post-December 2nd, 2001.

06 So, if I put those together, does that mean that  
07 for documents post 12-02-01, there is no assertion of  
08 attorney-client privilege on those particular documents that  
09 might evidence wrong doing?

10 MR. FERGUS: That is correct. And in the context  
11 that Mr. Sanders and I were speaking with Mr. Drivon, typically  
12 what would happen in a litigation context. If an advocate  
13 believed there was such a document, it would be brought to the  
14 attention of the judge in that context. There would be an  
15 opportunity to understand what information there is, is there an  
16 explanation, so that the issue can be fully heard before the  
17 judge. And then, in that situation, a judge would make a  
18 decision as to whether that particular document would fall in  
19 that category.

20 That is context -- I believe that's the law, and  
21 that is the context in which it falls.

22 Do you have any other questions?

23 SENATOR KUEHL: No, sir.

24 MR. FERGUS: I'd also like to respond to a  
25 comment by Senator Bowen or a question.

26 I believe I've provided to the committee in the  
27 June 26th letter the citation of current California authority on  
28 the question of inadvertent disclosure. I believe the case is

0034

01 State Workers Compensation versus -- I can't recall.

02 In addition to that being the law, at an early  
03 point in this investigation, in order to speed up the process, I  
04 believe it's in February of this year, I believe we reached an  
05 accommodation with the committee that both that case and the ABA  
06 rule would apply in the event of an inadvertent disclosure. So  
07 that we had it -- before anything happened, we had that  
08 understanding.

09 CHAIRMAN DUNN: Committee members, in the packets  
10 that were delivered for it, Mr. Fergus did attach to his June  
11 26th letter an April letter which references the citations he's  
12 just referring to.

13 Senator Bowen.

14 SENATOR BOWEN: I guess that leads me to the  
15 practical matter, which is that your letter of June 26th asks  
16 for a return of those -- in one place you ask for the return of  
17 the documents that don't comply. In another instance, you ask

for the return of CDs containing the e-mail, and you list various individuals.

I think the difficulty here, and it's going to be this difficulty with every issue we confront, is that we don't have any idea what those CDs contain; the CDs that are labeled, if they actually comport with their label.

I have in my record collection at home a 45 that has the same label on both sides, and it's not the same tune on on both sides. You can't tell unless you look.

And so far, we've been stopped from looking, at least we stopped ourselves, I guess.

0035

MR. FERGUS: One of the things I think it's fair to say, that the reason this came about is, it was a copying error done at Merrill. The information had been sent there with certain instructions that weren't followed. So, we started out with copying error.

I personally don't have a set of them, so I haven't had a chance to look at them either.

SENATOR BOWEN: But that's on information and belief that it's a copying error.

MR. FERGUS: Yes, that's absolutely correct.

SENATOR BOWEN: We don't know that it's a copying error. It's Enron's assertion that it's a copying error.

MR. FERGUS: Understood.

I think the other thing I would like to point out is --

CHAIRMAN DUNN: Before you do that, Senator Sher has a question.

SENATOR SHER: I just want to be clear on what your position is.

Your position is that the furnishing of the CDs was unintentional and inadvertent, not that furnishing any particular thing on the CDs; is that right? So, that under the agreement in April, that you're entitled to get the CDs back.

MR. FERGUS: I have to confess, I'm not sure of the distinction.

It would seem to me that what's critical here is the communication, not the medium. And so if, for example, the reason we referred to both document and CD is, it is possible

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that someone would have printed it out or copied it. So, we wanted what the essence of the communication, that disclosure was inadvertent.

SENATOR SHER: You're asking for the CDs to be returned. And then, you're going to have -- the Enron people would go through them again and then submit to us those portions that are not covered by the agreement?

MR. FERGUS: That is correct.

Your last term confused me when you said "agreement," but the claim of privilege.

SENATOR SHER: The claim of privilege.

MR. FERGUS: Correct.

SENATOR SHER: And the concern is that if we reviewed them, that we would see things that are privileged; is that right?

MR. FERGUS: My belief.

SENATOR SHER: There's no way to do it that would make the distinction?

I mean, you're not claiming, because you haven't seen it, but your client's not claiming that everything on the CDs is privileged; is that right?

CHAIRMAN DUNN: If I can make one insertion here, my apologies, Senator Sher.

Mr. Drivon, knowing the technical incompetent

25 that I am, correct me if I state this incorrectly.  
 26 MR. DRIVON: No, so far you're right.  
 27 CHAIRMAN DUNN: Okay, thank you.  
 28 Because of the TIF format, by definition we would  
 0037  
 01 have to open the files to determine their dates, to determine  
 02 whether they came pre or post bankruptcy?  
 03 MR. DRIVON: That's right, but in direct answer  
 04 to your question, for instance, these two documents that we have  
 05 before us here, the sync logs, I showed them to Mr. Fergus this  
 06 morning. And I believe -- and correct me if I'm misstating  
 07 this, Mr. Fergus -- but I believe Mr. Fergus agreed that these  
 08 two documents are probably not privileged under the  
 09 attorney-client privilege.  
 10 MR. FERGUS: That's correct.  
 11 MR. DRIVON: Even though they're dated April 29th  
 12 of 2002, and they're from an attorney.  
 13 So, in order for these tapes -- these disks to be  
 14 sanitized, somebody would have to go through and look at each  
 15 one of these, and make a legal determination as to whether the  
 16 privilege applied to that particular document.  
 17 MR. FERGUS: I would also go on to say, in  
 18 addition to asserting that it is not attorney-client privilege,  
 19 I would also believe it would not fall within the scope of the  
 20 original subpoena.  
 21 I understand the issue about -- there's a  
 22 relevance question, too, that goes to it.  
 23 I think the other thing that is important for --  
 24 we've been discussing, or there's been discussions this morning,  
 25 as I understand it, of either/or. That the Enron production of  
 26 those TIF files is an indication that there is not also  
 27 somewhere else in the production the electronic copy.  
 28 One of the issues that Enron has faced, and  
 0038  
 01 again, this is on information and belief, but there have been  
 02 investigations that have been going on for many different  
 03 agencies. One of the things that Enron has done is created an  
 04 imaging system, so that when paper goes out, generally speaking,  
 05 it is imaged, and so it's knowing what's produced. That creates  
 06 a TIF file.  
 07 Now, under the arrangement that we have right now  
 08 with the committee, if we only gave you the electronic file and  
 09 not the TIF file, I suspect that would be a problem. If we only  
 10 gave you a TIF and not the electronic, that's a problem.  
 11 So what's happening is, I think you're getting  
 12 both.  
 13 Now, Mr. Drivon referenced 50 CDs. The count  
 14 that I have from the client, and we have to verify to make sure  
 15 we're all in sync, because these things have come in over time,  
 16 is, there's almost a hundred CDs of data that's been produced  
 17 over time. Plus, there have got to be five, six, or seven of  
 18 what are called DLT-4 tapes, which are probably the equivalent  
 19 -- correct me if I'm wrong, Mr. Drivon -- I think about 600  
 20 CDs.  
 21 MR. DRIVON: Each.  
 22 MR. FERGUS: Each, of different data. We've  
 23 offered to the committee, we've offered to other investigative  
 24 agencies, there's 600 DLT tapes sitting in Portland, there's one  
 25 copy of, that we're trying to figure out how to get to the  
 26 various investigating agencies.  
 27 In Houston, there are literally thousands of DLT  
 28 backup tapes. And I could go into a more detailed explanation  
 0039  
 01 of why it's complicated.  
 02 The point I'm trying to make is, there's been

03 lots of data flowing towards the committee in an effort to  
04 comply with, you know, geographically there was a California  
05 production, there was an offer for Portland. There's been a  
06 Houston production most recently. And the last thing we're  
07 dealing with are the backup tapes.

08 So quite honestly, it's understandable if you're  
09 looking at TIF files, do you know whether you've also got the  
10 electronic? That's not an easy thing to know, and I do  
11 understand that problem.

12 CHAIRMAN DUNN: Because we're crunching up the  
13 time, Mr. Fergus, I don't want to cut you off, but if there are  
14 additional comments you'd like to make, please, let's get to  
15 them.

16 MR. FERGUS: I think the -- to be clear, Enron is  
17 willing to work with the committee in an in camera inspection to  
18 satisfy the committee on the trust issue with respect to items  
19 that have already been produced, that when we give you a  
20 replacement CD, we can match them on an electronic way, file by  
21 file, or length by length, some way that satisfies your expert.

22 We've also, you know there was some references to  
23 the presentation last week. As the Chair knows, we asked in  
24 advance of that hearing to get a copy of the materials so that  
25 we could have the IT people at Enron look at it and respond.  
26 They now have it and are looking at it. We've invited Mr.  
27 Sorokin to come to Houston to first, you know, set up what are  
28 the types of things he wants to see. And so long as it's

0040  
01 consistent with all the other investigations in the preservation  
02 of data, Enron's more than willing to cooperate.

03 So there's, I think, a lot more cooperation going  
04 on than I heard discussed this morning. And those offers still  
05 stand.

06 So, I think that, you know, the bottom line is,  
07 as to these two specific documents which brought us here today,  
08 I believe I've been told, on information and belief, that  
09 there's an explanation that will deal with the deletions.

10 Second, Enron does assert that there was an  
11 inadvertent disclosure. And I believe that under the agreement  
12 we had with the committee, and under the California law, and the  
13 ABA Ethical Committee, Enron is entitled to get those documents  
14 back, with the proviso that I mentioned.

15 And we're happy to work with the committee to try  
16 to reach some solution quickly and economically that preserves  
17 the privilege, but also meets the committee's needs.

18 CHAIRMAN DUNN: Mr. Fergus, thank you.

19 Any last comments, Mr. Drivon?

20 MR. DRIVON: Yes.

21 The great majority of the data that we have been  
22 provided, at least in terms of volume, is trading data. That's  
23 different from what we have here.

24 But with respect to running around and trying to  
25 do all of this analysis, and work out electronic solutions to  
26 this, that's very expensive. It's expensive for Enron, and it's  
27 expensive for us. The expense to us is more relevant to me than  
28 the expense to them.

0041  
01 So, you can't just say, okay, fine, we can run  
02 off to Houston, and, you know, spend three weeks trying to  
03 figure this out. It's too expensive. It will cost a bunch of  
04 thousands of dollars to do that.

05 CHAIRMAN DUNN: Seeing no further questions,  
06 comments from the committee, let me reiterate the  
07 recommendation. I'll put it into a motion, Mr. Drivon, and  
08 correct me if I misstate this.

09 The recommendation of Mr. Drivon is that we do an



in camera review of the CDs in question, and that that in camera review be done by the Chair and designees, which may involve other committee members or specific staff, and that we commence that review in camera, subject to heightened or hyper confidentiality provisions.

Is that correct, Mr. Drivon?

MR. DRIVON: Yes. And I would take on to myself the supervision, direct supervision, of that effort.

MR. FERGUS: May I make one objection?

CHAIRMAN DUNN: You may, Mr. Fergus.

MR. FERGUS: Enron does not intend to waive its attorney-client privilege by in any way agreeing to an in camera inspection.

Enron does agree to work with the committee to preserve its attorney-client privileged communication and achieve the committee's objectives, but we to object to the extent it would be deemed a waiver.

CHAIRMAN DUNN: Okay. Last comment, Mr. Drivon.

MR. DRIVON: Yes, Senator.

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This in camera review is to determine whether or not there is privileged information. So, I don't believe that if there was an in camera hearing in a similar way in court, in a Superior Court, for instance, that the fact that that in camera review was taking place would be a waiver of the privilege.

The purpose of the review is to determine whether or not the privilege is in place.

And I want this on the record because Enron expressed to me considerable concerns about how others might view what actions we took in terms of waiving the privilege.

CHAIRMAN DUNN: So noted.

The committee, I think, has heard the motion. Any questions? Last comments?

Motion having been made, Secretary, please call the roll.

SECRETARY MORALES: Chairman Dunn.

CHAIRMAN DUNN: Aye.

SECRETARY MORALES: Senator Bowen.

SENATOR BOWEN: Aye.

SECRETARY MORALES: Senator Chesbro.

SENATOR CHESBRO: Aye.

SECRETARY MORALES: Senator Escutia. Senator Johannessen. Senator Kuehl.

SENATOR KUEHL: Aye.

SECRETARY MORALES: Senator Morrow.

SENATOR MORROW: Aye.

SECRETARY MORALES: Senator Sher.

0043

SENATOR SHER: Aye.

SECRETARY MORALES: The motion passes, 6-0.

CHAIRMAN DUNN: Motion passes 6-0.

We're through for the day. We'll keep everyone posted on hearings next week. Of course, July 11th is on, re: the Perot Systems questions, and we will keep everyone updated on the LADWP.

Mr. Fergus, again, thank you very much for coming here at the last minute.

MR. FERGUS: Thank you, Mr. Chairman.

[Thereupon this portion of the Senate Select Committee hearing was terminated at approximately. 11:25 A.M.]

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CERTIFICATE OF SHORTHAND REPORTER

I, EVELYN J. MIZAK, a Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing transcript of the hearing of the Senate Select Committee to Investigate Price Manipulation on the Wholesale Energy Market was reported verbatim in shorthand by me, Evelyn J. Mizak, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

---

EVELYN J. MIZAK  
Shorthand Reporter